

(2) *Exclusion for fiduciary ownership.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares in a fiduciary capacity. Shares shall not be deemed to have been acquired in a fiduciary capacity if the acquiring insured depository institution or company has sole discretionary authority to exercise voting rights with respect thereto.

(3) *Exclusion for debts previously contracted.* No insured depository institution or company controls another insured depository institution or company by virtue of its ownership or control of shares acquired in securing or collecting a debt previously contracted in good faith, until two years after the date of acquisition. The two-year period may be extended at the discretion of the appropriate Federal banking agency for up to three one-year periods.

(b) *Controlling person* means any person having control of an insured depository institution and any company controlled by that person.

(c) *Leverage ratio* means the ratio of Tier 1 capital to adjusted total assets, as calculated in accordance with part 167 of this chapter.

(d) *Management fee* means any payment of money or provision of any other thing of value to a company or individual for the provision of management services or advice to the Federal savings association or related overhead expenses, including payments related to supervisory, executive, managerial or policymaking functions, other than compensation to an individual in the individual's capacity as an officer or employee of the Federal savings association.

(e) *Risk-weighted assets* means total risk-weighted assets, as calculated in accordance with part 167 of this chapter.

(f) *Tangible equity* means the amount of a Federal savings association's core capital as computed in part 167 of this chapter plus the amount of its outstanding cumulative perpetual preferred stock (including related surplus), minus intangible assets as defined in §167.1 of this chapter, except mortgage servicing assets to the extent

they are includable under §167.12. Non-mortgage servicing assets that have not been previously deducted in calculating core capital are deducted.

(g) *Tier 1 capital* means the amount of core capital as defined in part 167 of this chapter.

(h) *Tier 1 risk-based capital ratio* means the ratio of Tier 1 capital to risk-weighted assets, as calculated in accordance with part 167 of this chapter.

(i) *Total assets*, for purposes of §165.4(b)(5), means adjusted total assets as calculated in accordance with part 167 of this chapter, minus intangible assets as provided in the definition of tangible equity.

(j) *Total risk-based capital ratio* means the ratio of total capital to risk-weighted assets, as calculated in accordance with part 167 of this chapter.

§ 165.3 Notice of capital category.

(a) *Effective date of determination of capital category.* A Federal savings association shall be deemed to be within a given capital category for purposes of section 38 of the FDI Act and this part as of the date the savings association is notified of, or is deemed to have notice of, its capital category, pursuant to paragraph (b) of this section.

(b) *Notice of capital category.* A Federal savings association shall be deemed to have been notified of its capital levels and its capital category as of the most recent date:

(1) A Consolidated Report of Condition (Call Report) or Thrift Financial Report (TFR), as appropriate, is required to be filed with the OCC;

(2) A final report of examination is delivered to the savings association; or

(3) Written notice is provided by the OCC to the savings association of its capital category for purposes of section 38 of the FDI Act and this part or that the savings association's capital category has changed as provided in paragraph (c) of this section or §165.4(c).

(c) *Adjustments to reported capital levels and category*—(1) *Notice of adjustment by Federal savings association.* A Federal savings association shall provide the OCC with written notice that an adjustment to the savings association's capital category may have occurred no later than 15 calendar days following

the date that any material event has occurred that would cause the savings association to be placed in a lower capital category from the category assigned to the savings association for purposes of section 38 and this part on the basis of the savings association's most recent Call Report or TFR, as appropriate, or report of examination.

(2) *Determination by the OCC to change capital category.* After receiving notice pursuant to paragraph (c)(1) of this section, the OCC shall determine whether to change the capital category of the Federal savings association and shall notify the savings association of the OCC determination.

§ 165.4 Capital measures and capital category definitions.

(a) *Capital measures.* For purposes of section 38 and this part, the relevant capital measures shall be:

- (1) The total risk-based capital ratio;
- (2) The Tier 1 risk-based capital ratio; and
- (3) The leverage ratio.

(b) *Capital categories.* For purposes of section 38 and this part, a Federal savings association shall be deemed to be:

(1) *Well capitalized* if the savings association:

- (i) Has a total risk-based capital ratio of 10.0 percent or greater; and
- (ii) Has a Tier 1 risk-based capital ratio of 6.0 percent or greater; and
- (iii) Has a leverage ratio of 5.0 percent or greater; and

(iv) Is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the OCC or OTS under section 8 of the FDI Act, the International Lending Supervision Act of 1983 (12 U.S.C. 3907), the Home Owners' Loan Act (12 U.S.C. 1464(t)(6)(A)(ii)), or section 38 of the FDI Act, or any regulation thereunder, to meet and maintain a specific capital level for any capital measure.

(2) *Adequately capitalized* if the savings association:

- (i) Has a total risk-based capital ratio of 8.0 percent or greater; and
- (ii) Has a Tier 1 risk-based capital ratio of 4.0 percent or greater; and
- (iii) Has:

(A) A leverage ratio of 4.0 percent or greater; or

(B) A leverage ratio of 3.0 percent or greater if the savings association is assigned a composite rating of 1, as composite rating is defined in § 116.5(c) of this chapter; and

(iv) Does not meet the definition of a *well capitalized* savings association.

(3) *Undercapitalized* if the savings association:

- (i) Has a total risk-based capital ratio that is less than 8.0 percent; or
- (ii) Has a Tier 1 risk-based capital ratio that is less than 4.0 percent; or
- (iii)(A) Except as provided in paragraph (b)(3)(iii)(B) of this section, has a leverage ratio that is less than 4.0 percent; or

(B) Has a leverage ratio that is less than 3.0 percent if the savings association is assigned a composite rating of 1, as composite rating is defined in § 116.5(c) of this chapter.

(4) *Significantly undercapitalized* if the savings association has:

- (i) A total risk-based capital ratio that is less than 6.0 percent; or
- (ii) A Tier 1 risk-based capital ratio that is less than 3.0 percent; or
- (iii) A leverage ratio that is less than 3.0 percent.

(5) *Critically undercapitalized* if the savings association has a ratio of tangible equity to total assets that is equal to or less than 2.0 percent.

(c) *Reclassification based on supervisory criteria other than capital.* The OCC may reclassify a well capitalized Federal savings association as adequately capitalized and may require an adequately capitalized or undercapitalized Federal savings association to comply with certain mandatory or discretionary supervisory actions as if the savings association were in the next lower capital category (except that the OCC may not reclassify a significantly undercapitalized savings association as critically undercapitalized) (each of these actions are hereinafter referred to generally as "reclassifications") in the following circumstances:

(1) *Unsafe or unsound condition.* The OCC has determined, after notice and opportunity for hearing pursuant to § 165.8(a) of this part, that the savings association is in an unsafe or unsound condition; or

(2) *Unsafe or unsound practice.* The OCC has determined, after notice and